

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re JOSE H., a Minor.

LUCILA L.,

Petitioner and Respondent,

v.

ROSSANA R.,

Objector and Appellant.

F071603

(Super. Ct. No. AT3488)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. James L. Compton, Commissioner.

Carol Koenig, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioner and Respondent.

-ooOoo-

* Before Gomes, Acting P.J., Kane, J. and Smith, J.

INTRODUCTION

Appellant Rossana R.'s parental rights to her biological son, Jose H., were terminated pursuant to Probate Code section 1516.5.¹ She challenges the order terminating her parental rights on the grounds Jose had not been in the physical custody of a guardian for a period of two years, as required by section 1516.5, subdivision (a)(2). She also contends there is insufficient evidence to support the trial court's finding that termination of her parental rights is in the child's best interests, as required by section 1516.5, subdivision (a)(3). We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Rossana was 16 years old when she gave birth to Jose in 2004. Rossana's mother, Lucila L. (grandmother), assisted Rossana with caring for Jose during the first year of his life. Rossana then left for Texas with her boyfriend; Jose remained in California with grandmother. Grandmother filed for a legal guardianship when Rossana left for Texas, when Jose was about 18 months old.

The guardianship petition was filed by grandmother on April 26, 2006. In the petition, grandmother alleged that Rossana had left for Texas with a boyfriend who used drugs, was a thief, and possibly a gang member; neither Rossana nor the boyfriend had a job in Texas. The petition also alleged that Rossana acted inappropriately toward Jose, yelling and cursing at him when she was irritated. Grandmother stated she had refused to allow Rossana to take Jose to Texas because of these concerns.

The guardianship paperwork also contained an optional provision that could be checked, which stated "Petitioner, with intent to adopt, has accepted or intends to accept physical care or custody of the minor." Grandmother checked this box in the guardianship petition.

¹ References to code sections are to the Probate Code unless otherwise specified.

Grandmother was given a five-page document entitled, “DUTIES OF GUARDIAN” and signed an acknowledgement that she had received the document. In language found in the bottom half of page 4 of the document, it states that for appointment as a guardian to be valid, an order must be signed. This language is not in either bold or large print.

Rossana was personally served on May 8, 2006, with the guardianship papers. The trial court held a contested evidentiary hearing on the guardianship petition on May 23, 2006. Both grandmother and Rossana were present and testified at the hearing. The trial court granted the petition “AS PRAYED.” The minute order notes that grandmother needed the assistance of an interpreter at the hearing; Rossana did not.

Rossana continued to live in Texas for two years, while Jose remained in California with his grandmother. Rossana did not have any contact with Jose while she was in Texas. She did not contact grandmother because she forgot grandmother’s phone number.

When Rossana moved back to California from Texas, she moved in again with grandmother and Jose for a month or two. Jose was in preschool and grandmother was the one who took him to preschool every day. Rossana moved out after a month or two to live with a boyfriend. She did not attempt to take Jose with her because she and her boyfriend moved into a one-bedroom apartment. When she moved into a larger apartment, she still did not ask or attempt to take Jose to live with her.

There were frequent visits between Rossana and Jose between 2008 and 2011. In 2012 and 2013, after Rossana had moved further away to Bakersfield, the visits became less frequent. In 2014, Rossana did not see Jose from January until July because she “didn’t have time. I would be working all the time.” Rossana worked 28 hours per week.

On July 3, 2014, grandmother filed a petition pursuant to section 1516.5 and Family Code section 7822 to declare Jose free from parental custody and control and to adopt Jose. The petition alleged that Jose came within the provisions of Family Code section 7822, subdivision (a)(2), in that Jose’s parents had failed to provide any support

or to communicate for a period of six months, with the intent to abandon the child. The petition also alleged that Jose came within the meaning of section 1516.5, in that his parents did not have legal custody; he had been in the physical custody of a guardian for at least two years; and it would be in Jose's best interests that parental rights be terminated and he be adopted by grandmother.

At the initial hearing on August 22, 2014, Jose's father appeared with counsel; separate counsel was appointed to represent Rossana and Jose. Grandmother appeared in propria persona in the proceedings. At the hearing on September 19, 2014, Jose's father failed to appear. The matter was continued to September 19, 2014.

At the September 19, 2014 hearing, grandmother appeared and was unrepresented; Rossana appeared with counsel, and Jose's counsel was present. Jose's father failed to appear. The matter was continued so that Family Court Services could complete a report.

Family Court Services filed their report on November 12, 2014. The report indicated that Jose was interviewed in September 2014 for the report. Jose did not hesitate when asked if he wanted his father's parental rights terminated; Jose was in favor of his father's parental rights being terminated. When asked about Rossana's parental rights, Jose did not immediately respond. He indicated he considered grandmother and the people in her household to be his primary family, but he also enjoyed his visits with Rossana. Jose said his preference was to have Rossana's parental rights terminated so grandmother could adopt him, but he wanted to continue to visit with Rossana and her other children.

Jose's father was interviewed and indicated he had no objection to his or Rossana's parental rights being terminated because Jose had spent most of his life with grandmother. Rossana acknowledged she had not provided any support for Jose while he lived with grandmother. She indicated she visited Jose occasionally in 2013 and at Christmas that year, but not on his birthday. In 2014, she had Jose stay with her for a

week in the summer and then saw him on his birthday. Those were her only visits with Jose in 2014.

The social worker told Rossana that Jose was in favor of having her parental rights terminated and being adopted by grandmother, so long as he could continue to see Rossana, and that grandmother had committed to continuing to allow visits between the two. Rossana responded that she knew Jose considered grandmother's home to be his home, but Rossana felt he belonged with her.

Living in grandmother's home were grandmother, her male companion, two of grandmother's children, and Jose. It was a three-bedroom residence and Jose shared a bedroom with his uncle. The report opined that during the years Jose had been living with grandmother, he came to view himself as a member of that family and he considered grandmother's residence his home. Also noted was that Rossana's visits with Jose were infrequent, sometimes with no visits for many months, even though Rossana lived in the same county. The report also noted that Rossana acknowledged not providing for Jose in all the years he lived with grandmother.

The report opined that the circumstances of the case met the criteria under Family Code section 7822 and the petition should be granted on that ground. The report noted that the conditions of section 1516.5 also were met if the guardianship related back to the 2006 date, when it was granted. The investigator recommended that the petition be granted under Family Code section 7822.

At the November 14, 2014, hearing, Jose's father stated he did not oppose the petition. Grandmother testified that Rossana had visited with Jose in July 2014, and had visited at Christmastime and on his birthday in 2013. Grandmother also testified that Rossana generally called once a week.

At this point, the trial court stated, "sounds like there's been a contact by [Rossana] on a fairly regular basis." The trial court further stated it did "not find there has been an abandonment period in excess of six months." Counsel for Rossana and

counsel for father then argued when the guardianship became effective, with Rossana contending it was not effective until July 2013, when letters issued; and father arguing the two-year period should be calculated from when the guardianship was granted in 2006.

Discussions were had off the record, after which the matter proceeded on the record. After further argument from counsel for Rossana and father, the trial court stated that section 1516.5 apparently made a distinction between legal custody and physical custody, with the child having to be in the guardian's physical custody for a period of two years. The trial court invited both parties to submit briefs on the application of section 1516.5.

Grandmother testified that she had been Jose's guardian since he was 18 months old, although letters did not issue until July 2013. She believed it was in Jose's best interests to be adopted by her because he had lived with her all of his life. She testified she would continue to allow Jose to visit with and see Rossana, and she had told Jose this.

Grandmother attends school conferences, provides Jose's food and clothing, and takes him to the doctor when necessary. Jose's aunt, one of grandmother's daughters, takes him to soccer practices and games when grandmother is working.

Rossana testified she never knew grandmother had sought and obtained a guardianship. She then acknowledged that she came to the court hearing on the guardianship, but claimed she didn't know "what was going on." She also acknowledged that in April 2014, she filed a petition to terminate the guardianship, but never served the paperwork and never told grandmother she had filed the paperwork.

Rossana was inconsistent as to whether she wanted the guardianship to continue. At the start of the hearing on the petition to terminate parental rights, Rossana maintained that she wanted the guardianship to continue, but did not want grandmother to adopt Jose. Then later in the proceedings, she asserted she wanted to terminate the guardianship.

The trial court took judicial notice of the guardianship proceedings in Kern Superior Court case No. PB55435.

At the conclusion of the testimony, the trial court heard arguments from the parties. Counsel for Rossana argued that there was no abandonment, thus Family Code section 7822 was inapplicable, and that there had not been a guardianship in effect for two years, so section 1516.5 did not apply.

Counsel for father argued that Rossana relinquished custody in 2006 and never made any real attempt to obtain custody of Jose after the guardianship hearings in 2006. Counsel argued that the stability and best interests of the child were to have parental rights terminated and Jose be adopted by grandmother.

Counsel for Jose argued that Jose considered grandmother's home his home and wanted to be adopted by grandmother. Jose's counsel asked the trial court to grant the petition pursuant to section 1516.5 and terminate parental rights.

At the conclusion of testimony and argument, the trial court granted the petition pursuant to section 1516.5, finding that Jose had been "in the physical custody of the grandmother, now the guardian since 2006." The trial court found that it was in Jose's best interests to have the petition granted and to be adopted by grandmother.

Rossana filed a notice of appeal on May 7, 2015. Appellate counsel was appointed to represent Rossana on June 9, 2015.

DISCUSSION

Rossana raises two issues in this appeal. First, she contends the trial court erred in granting the petition pursuant to section 1516.5 because the guardianship had not been in effect for two years. Second, she contends substantial evidence does not support the trial court's finding that termination of her parental rights is in Jose's best interests. We disagree.

Section 1516.5

Section 1516.5 provides that a proceeding to declare a child free from the custody and control of parents may be brought within an existing guardianship proceeding, in an adoption proceeding, or in a separate action filed for that purpose, if all of the following requirements are satisfied:

“(1) One or both parents do not have the legal custody of the child.

“(2) The child has been in the physical custody of the guardian for a period of not less than two years.

“(3) The court finds that the child would benefit from being adopted by his or her guardian....”

Jose was born in August 2004. He has been living with grandmother since birth. On April 26, 2006, grandmother filed a petition to be appointed Jose’s legal guardian. On May 23, 2006, after a contested hearing at which Rossana and grandmother both personally appeared, the petition was granted and a minute order entered in the file. The formal written order was not filed until May 2, 2013. Letters of guardianship issued July 5, 2013. The petition pursuant to section 1516.5 was filed July 3, 2014.

Rossana challenges two of the three components that must be satisfied under section 1516.5: the second, which requires that the child must be in the physical custody of the guardian for two years; and the third, that the best interests of the child are served by termination of parental rights and adoption by the guardian. The first component, that the parents do not have legal custody of the child, is unchallenged. We address each of the two challenged components separately.

Guardianship

Rossana argued in the trial court that the guardianship was not effective until the written order is filed and letters issued. She asserts this same position in this appeal and contends the guardianship became effective in July 2013, when letters issued.

Consequently, the petition was filed less than two years after the guardianship. We disagree.

In a guardianship proceeding, the appealable document is the order, not the letters that may issue. Issuance of letters when no bond is required, as is the case here, “serves merely to solemnize the rights and duties created by the court’s order.” (*Guardianship of Donaldson* (1986) 178 Cal.App.3d 477, 485.) It is the order that establishes the right to custody of the child. (*Ibid.*)

The California Supreme Court addressed section 1516.5 in *Guardianship of Ann S.* (2009) 45 Cal.4th 1110. In that opinion, the court noted that the reference “to ‘physical custody’ is ambiguous; it might include a period before the acquisition of legal custody through the establishment of a guardianship, or it might simply require that the guardian act as physical custodian, in addition to having legal custody.” (*Id.* at p. 1131, fn. 13.) The California Supreme Court found the first construction posited to be “constitutionally problematic, because it would imply that the parent’s legal and perhaps joint physical custody rights might continue until the time of the termination proceeding.” (*Ibid.*) The California Supreme Court concluded by adopting “the construction that avoids casting doubt on the statute’s constitutional validity, and hold that physical and legal custody by the guardian for two years is required under section 1516.5, subdivision (a)(2).” (*Ibid.*)

The written order for guardianship was filed in May 2013, several years after the guardianship was granted in 2006 following a contested hearing. The reason for the delay in entering a formal written order does not expressly appear in the record. However, the record does reflect that grandmother needed the assistance of an interpreter and was not represented by counsel. We can find no indication that an interpreter was provided to explain the forms, or that forms in Spanish were provided, to enable grandmother to fully understand the need to submit any further documents. The minute order does not reflect that the trial court informed grandmother during the hearing at

which the guardianship was granted, while an interpreter was present, that she needed to submit a written order to finalize the guardianship.

The order filed May 2, 2013, is the order memorializing the actions taken at the May 23, 2006, hearing. Failure to timely enter a judgment or an appealable order is a recognized ground for nunc pro tunc entry. (*Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1000, fn. 1.)

Appellate courts have deemed orders to be filed nunc pro tunc, even though not specifically so designated by the trial court. (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1249.) In *Critzer*, an order was submitted and filed in the wrong proceeding; it was deemed filed nunc pro tunc in the correct proceeding. (*Ibid.*) In *Bed Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, an order was submitted for filing and signed on January 30, 1995. The appellate court deemed it filed nunc pro tunc as of March 18, 1994, the date of the ruling. (*Id.* at p. 884, fn. 11.)

In *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 213, the appellate court stated that when it is clear an appealable judgment, or in this case an appealable order, should have been rendered, the appellate court is empowered to order the entry nunc pro tunc. The appellate court deemed a judgment to have been entered nunc pro tunc as of the date it should have been entered. (*Id.* at p. 214.)

Nunc pro tunc entry of an order or judgment is appropriate if the order or judgment does not include any changes to what the trial court actually did. (*Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 890–891.) Nunc pro tunc entry is not appropriate if the order specifies new grounds or reasons. (*Fergus v. Songer* (2007) 150 Cal.App.4th 552, 565–566.) The entry of a nunc pro tunc order is essentially clerical; it corrects the record to reflect an order actually made, not a new order previously not made. (*Bed Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, supra*, 52 Cal.App.4th at pp. 883–884.)

Here, the May 2013 order does not include any changes to anything the trial court ordered at the May 23, 2006, hearing granting the guardianship. The order filed May 2, 2013, reflects that it is the order from the May 23, 2006, hearing and it incorporates in the attachment the same additional orders for visitation that were specified at the May 23, 2006, hearing. The order filed May 2, 2013, is reflecting something that was actually ordered May 23, 2006—the granting of a guardianship. Both Rossana and grandmother, for all intents and purposes, proceeded as though a legal guardianship was in effect from May 23, 2006, forward, when it was ordered by the trial court.

The entry of a nunc pro tunc order may be made at any time. (See *In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, 852.) Therefore, we will deem the May 2, 2013, order entered nunc pro tunc as of May 23, 2006. (*Bed Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, supra*, 52 Cal.App.4th at p. 884, fn. 11.) Consequently, a legal guardianship was in effect for a period of two years or more as required by section 1516.5, subdivision (a)(2).

Best Interests of the Child

Section 1516.5, subdivision (a)(3) provides that in determining the best interests of the child, the trial court should assess the nature and extent of the relationship between the child and the birth parent, siblings and half-siblings, the guardian and any family members of the guardian. Trial courts have broad discretion in assessing the relevant factors. (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1138.)

With respect to Jose's relationship with his guardian and her family, Jose told Family Court Services that he considered grandmother and the people in her household to be his primary family. Jose said his preference was to have Rossana's parental rights terminated so grandmother could adopt him. Grandmother had been Jose's guardian since he was 18 months old, although letters did not issue until July 2013. Grandmother attends school conferences, provides Jose's food and clothing, and takes him to the doctor when necessary. Jose's aunt, one of grandmother's daughters, takes him to soccer

practices and games when grandmother is working. Jose shared a bedroom with his uncle.

As for Jose's relationship with his birth mother and half-siblings, all parties acknowledged he enjoyed his visits with them. Jose wanted to continue to maintain contact with his mother and half-siblings. Grandmother agreed to continue to allow Jose to visit with and contact Rossana and his half-siblings. This concern of Jose's also was addressed by the trial court when it provided for visitation in the order granting the petition.

Although Rossana was attentive to Jose when she visited him, she went for long periods of time with no contact. The guardianship hearing was held in 2006 and the guardianship granted at that time. In the ensuing years, Rossana took no effective steps to terminate the guardianship and regain custody of Jose.

As the California Supreme Court stated, "[a]fter years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed caregiver." (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1136.) Grandmother was a fully committed caregiver and had been throughout Jose's life, providing him with a stable home environment. "The guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes." (*Ibid.*)

Rossana, even at the commencement of the proceedings on the petition to terminate her parental rights, was not fully committed to being a parent to Jose; she told the trial court she wanted the guardianship to continue.

Both Jose's birth father and counsel for Jose urged the trial court to grant the petition and allow grandmother to adopt Jose. Counsel argued that the stability and best interests of the child were to have parental rights terminated and Jose be adopted by grandmother. Counsel for Jose argued that Jose considered grandmother's home his home and wanted to be adopted by grandmother.

Although Rossana seems to argue that a finding of best interests of the child should involve a demonstration that she is somehow an unfit parent, no such determination is required by section 1516.5. In a termination of parental rights in a guardianship proceeding, “the parent-child family unit has ceased to exist and the parent’s entitlement to custody is not at issue.” (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1135.)

Section 1516.5 is designed to afford “children in probate guardianships the opportunity to enjoy permanent adoptive homes with familiar caretakers” and give “willing guardians the chance to become adoptive parents.” (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1138.) Jose had been living with grandmother for most of his life—over eight years—and both he and grandmother desired that he be adopted. The trial court’s determination that Jose’s best interests were served by terminating parental rights and allowing Jose to be adopted by grandmother allowed Jose to be in a “stable, continuing, and permanent placement with a fully committed caregiver.” (*Id.* at p. 1136.)

We conclude substantial evidence supports the trial court’s finding that Jose’s best interests were served by terminating parental rights and allowing grandmother to adopt.

DISPOSITION

The order is affirmed.